IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10987 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GHANSHYAM @ KALIYO HIRABHAI TANK

Versus

THE COMMISSIONER OF POLICE,

Appearance:

1. Special Civil Application No. 10987 of 2004

MS BANNA S DUTTA for Petitioner No. 1

MS HB PUNANI AGP for Respondent No. 1-3

RULE SERVED for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 14/12/2004

ORAL JUDGEMENT

#. Heard Ms.Banna Datta, learned counsel appearing for the petitioner and Ms.H.B.Punani, learned AGP for the

other side.

#. The present petition is filed under Article 226 read with Articles 21 and 22(5) of the Constitution of India challenging the legality and validity of the order of detention dated 9.6.2004 passed by the Commissioner of Police, Rajkot City under purported exercise of powers vested with the detaining authority under Section 3(2) of the Gujarat Prevention of Anti-Social Activities Act, 1985 (for short "the Act").

#. The petitioner is branded as "a Bootlegger" within the meaning of Section 2(b) of the Act, as he was found involved in offences registered under the Bombay Prohibition Act.

#. The Police Commissioner, Rajkot city and the detaining authority has considered mainly the fact of registration of four criminal offences punishable under Section 66(1)(b) and 65(e) and 81 etc. of the Bombay Prohibition Act.

#. Of course, the authority has considered the facts stated by two witnesses who have claimed privilege of secrecy recorded by the sponsoring authority on 6th June, 2004 and verified by the detaining authority on 7th June, 2004. It is pointed out by Ms.Datta that the details of the four offences registered against the present petitioner is mentioned in the grounds for detention conveyed to the petitioner with the order under challenge when it was executed on the petitioner detenu. She has also pointed out that in first three offences, he is implicated on the same day and by the same police station, was arrested on 24th December, 2004 and enlarged on bail on that very day. Thereafter, for the fourth and last offence referred to in the grounds for detention, was committed on 20th May, 2004, that is after approximately five moths. On the earlier occasion, the petitioner was found to have been involved and dealing with country liquor but the forth offence is in connection with the Indian made foreign liquor. According to her, there was no cogent material available on record to record subjective satisfaction to the effect that the activity of the present petitioner is detrimental to maintenance of public order.

#. The order of detention under challenge is assailed on various grounds. However, she has focused her arguments mainly on the point that the petitioner ought not to have been placed under preventive detention because on the date of execution of the order, the petitioner was in

judicial custody. The inference drawn by the authority that the petitioner would apply for bail and then after getting bail, he would indulge into similar activities detrimental to public health and therefore, the order cannot be drawn on hypothesis or conjecture. There must be cogent material before the Officer passing the detention order that the detenu is likely to be released on bail and thereafter he will continue with such activities. She has also taken me through the relevant paragraph Nos.4, 5 and 6 of the decision in case of AMRITLAL AND OTHERS V. UNION GOVERNMENT reported in AIR 2000 SC 3675. The ratio of the decision in Head Note carved out by the editor is reproduced as under :

> "There must be cogent materials before the officer passing the detention order that the detenu is likely to be released on bail. The inference must be drawn from the available material on record and must not be the ipse dixit of the officer passing the order of detention. Likelihood of detenu's moving an application for bail is not a cogent material and detention order based on such material is liable to be quashed. The reasoning that there is "likelihood to be released on bail" is different from "likelihood of his moving an application for bail".

#. It clearly reveals that the petitioner on the date of passing and execution of the order, was in judicial custody and there was no cogent substantive material before the authority to infer that the petitioner shall continue with the similar activities. it is true that there were two different statements before the authority but it appears from the bare reading of these statements that the sponsoring authority has recorded the statements mechanically so that the appropriate orders from the competent authority of preventive detention can be obtained.

#. I have considered totality emerging from the record, the Court is of the view that the privilege exercised by the authority under Section 9(2) of the PASA Act, is also not proper and this vitiates the validity of the order and therefore, such order of detention or any further detention cannot sustain in the eye of law and hence, the petitioner shall have to be allowed.

#. The petition succeeds and the same is allowed. The order of detention dated 9.6.2004 is vitiated and the

same is hereby quashed and set aside. The detenu - GHANSHYAM @ KALIYO HIRABHAI TANK who has been detained at Bharuch Jail be set at liberty forthwith if not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct Service is permitted.

Date :14/12/2004 [C.K.Buch, J.]

#kailash#